IN THE HIGH COURT OF JUDICATURE FOR

RAJASTHAN AT JODHPUR

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O R D E R

Dr.Rajendra Singh Mehta
Vs.
State of Rajasthan & Ors.

S.B. CIVIL WRIT PETITION NO.2364/2002
UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER :: 16th October, 2006

REPORTABLE

PRESENT

HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

REPORTABLE

Mr.P.P. Choudhary, Advocate for the petitioner.
Mr.Rameshwar Dave, Dy. Govt. Advocate for respondents.

BY THE COURT

In this writ petition, the petitioner has prayed for a writ of mandamus that in view of the provisions contained in Rule 50 of the Rajasthan Civil Services (Pension) Rules, 1996 (for short

'Rules of 1996') he should be deemed to have retired voluntarily w.e.f. 01st January, 2002.

The petitioner was initially appointed as Medical Officer in the month of June, 1983 on ad hoc basis. He was later selected by Rajasthan Public Service Commission (in short 'RPSC') on the said post in March, 1984. The petitioner was transferred from the Primary Health Center, Mandolinagar, District Jalore to Primary Health Center, Tanwari, District Sirohi vide order dated 30th April, 1994. Requirement of the order was that petitioner should first report of Chief Medical & Health Officer, Sirohi (for short 'CMHO') for joining at Tanwari. But since the petitioner was relieved after five months, he in the meantime, misplaced the copy of transfer order and not knowing about this fact directly joined at Primary Health Center, Tanwari. He was therefore served with the charge-sheet dated 13th November, 1996 as to why he straightway joined Tanwari instead of first reporting to the office of CMHO, Sirohi. Charge levelled against the petitioner was that he continuously remained absent from 11th October, 1994. Simultaneously, the petitioner was also

placed under suspension. Second charge-sheet was served upon him on 26th February, 1997 on the allegation that he did not join the office during the period of suspension. The petitioner submitted reply to both the charge-sheets and denied the allegations levelled against him. On completion of inquiry, the Inquiry Officer submitted his report with respect to his first charge-sheet on 17th August, 2001 and regarding second charge-sheet on 08th June, 2001. The petitioner was supplied copies both the inquiry reports and was required to submit his representations there against. Due to personal reasons, the petitioner submitted an application dated 16th July, 2001 seeking voluntary retirement after completion of 15 years of service. The petitioner submitted his representations with regard to first inquiry report on 05th September, 2001 and for second inquiry report on 19th September, 2001.

The case of the petitioner is that he gave notice by his application to the respondents on 16th July, 2001 seeking voluntary retirement. In his application seeking voluntary retirement, the petitioner had categorically stated that

according to the provisions of Rule 50 of the Rules of 1996, he may be deemed to have voluntarily retired w.e.f. 01st January, 2002 and 31st December, 2001 may be treated as his last working day. The petitioner received an order dated 29th September, 2001 issued by CMHO with which he also received copies of orders dated 11th September, 2001 issued by the Additional Director & Secretary, Department of Personnel and dated 08th June, 2001 issued by Secretary, Department of Personnel. The CMHO forwarded the application of the petitioner for voluntary retirement to the Director vide letter dated 26th September, 2001. But nothing was done on the notice of the petitioner for seeking voluntary retirement. Then he sent reminder on 28th January, 2002. A letter dated 02nd February, 2002 was addressed to him by CMHO in which he informed that he was not the authority competent to either accept or refuse the request for voluntary retirement of the petitioner. A reference in this letter was made to the orders of the Government dated 11th September, 2001 and 29th September, 2001 and an impression was sought to be given as if the request for voluntary retirement has been refused

whereas those two orders had nothing to do with either acceptance or refusal of request for voluntary retirement. In the meantime, the respondents by order dated 31st October, 2001 imposed a penalty of withholding of four grade increments with cumulative effect with regard to first charge-sheet and by another order dated 31st December, 2001 imposed penalty of withholding one grade increment with cumulative effect for second charge-sheet.

In the first order of penalty, the period of suspension of the petitioner was forfeited and his period of absence was deemed to be break in service. The petitioner has alleged that these two orders were issued in the month of January, 2002. These orders are anti dated with a view to frustrating his request/notice for voluntary retirement. The annual increments were not released since 1995 nor was he fixed in the new pay scale w.e.f. September, 1996. It is in this background of the matter that the petitioner has filed the aforesaid writ petition.

The writ petition was contested by the respondents who

in their reply contended that the petitioner was issued charge-sheet because he remained willfully absent from the period since 11th October, 1994. There was no question of accepting his request of voluntary retirement because the fact regarding pendency of two disciplinary proceedings was fully well known to the petitioner when he submitted such application. It was denied that the order of penalty was anti dated. It has been submitted that during the pendency of the disciplinary proceedings, the petitioner was not entitled to earn annual grade increments fixed in the revised pay scale rules. It has therefore been prayed that the writ petition may be dismissed.

I have heard Mr.P.P. Choudhary, learned counsel for the petitioner and Mr.Rameshwar Dave, Dy. Government Advocate for the respondents and perused the record.

The petitioner in para 7 of the writ petition has asserted that he gave a notice of voluntary retirement on 16th July, 2001 stating therein that he had completed more than 15 years of service and therefore requested that he should be deemed to

have retired voluntarily w.e.f. 01st January, 2002 and his pension papers should be accordingly prepared. This application was addressed to Director, Medical & Health Service for Rajasthan with a copy endorsed to CMHO, Jalore. The respondents in reply to para 7 of the writ petition have not denied the fact with regard to receipt of application for voluntary retirement dated 16th July, 2001. What however they have stated is that since the petitioner was knowing it well that he was facing disciplinary proceedings in two matters he could not give the notice for voluntary retirement. Reference has been made to letter dated 02nd February, 2002 in which CMHO informed the petitioner that his application for voluntary retirement has been forwarded to Director, Medical & Health Service, but because of pendency of disciplinary proceedings against him, as per Rules, voluntary retirement could not be given to a delinquent government servant. No order permitting voluntary retirement of the petitioner has been received from the Director and so long as permission for voluntary retirement of the petitioner is not granted by Director, the petitioner could not treat himself to have retired voluntarily. He would

therefore be treated to have been absenting from the duties.

The only communication which was sent the petitioner after his notice for voluntary retirement was the letter dated 02nd February, 2002 which CMHO, Jalore wrote to him. In this letter, he has made reference to the order dated 11th September, 2001 and 29th September, 2001 both of which have got no relevance in so far as the issue regarding voluntary retirement is concerned. While CMHO wrote that due to pendency of the disciplinary proceedings against the petitioner, he could not be given voluntary retirement but at the same time he also wrote that no orders on the request of the petitioner for voluntary retirement has so far been received from the Director and therefore till orders are issued by the Director, the petitioner could not be deemed to have retired voluntarily. It is significant to note that even though the respondents received notice of voluntary retirement dated 16th July, 2001 but the communication sent to the petitioner in response thereto was as delayed as 02nd February, 2002 in which also the CMHO, Jalore merely informed the petitioner

that his application was pending consideration with the Director. Notice for voluntary retirement given by the petitioner was quite specific in which he categorically stated that he may should be deemed to have retired voluntarily w.e.f. 01st January, 2002 and his pension papers should accordingly be prepared.

I have to now examine whether in the light of the provisions contained in Rule 50 of the Rules of 1996 such a notice would have effect the voluntary retiring the petitioner or whether such retirement could not become effective in the absence of specific acceptance by the competent authority. The Rule 50 of the Rules of 1996 for the facility of the evidence is reproduced as under:-

> "**50** Retirement on completion of 15 years' qualifying service: (1) At any time after a Government servant has completed 15 years' qualifying service, he may, by giving a notice of not less than 3 months, in writing, to the appointing authority, retire from service;
> (2) The notice of voluntary retirement, given under sub-rule (1), shall require acceptance by the appointing authority;

> Provided that where the appointing authority does not refuse to grant permission of retiring, before the expiry of the period specified in said notice, the retirement shall automatically become effective from the date of expiry of said period."

The aforesaid Rule would make it clear that a government servant upon completing 15 years qualifying service may by giving a notice for a period not less than three months, in writing, to the appointing authority retire from service. This is therefore a right given to the government servant. This right has not been made to depend upon any other condition and therefore it cannot be accepted that the petitioner could not give notice for voluntary retirement merely because he was facing certain disciplinary proceedings. Sub-rule (2) however provides that a notice of voluntary retirement given under Sub-rule (1) would require acceptance by the appointing authority. It was open to the appointing authority to refuse to grant permission for voluntary retirement and the pendency of the disciplinary proceedings against the petitioner would in that event have been a relevant consideration for such refusal.

In the present case however, the respondents did not either accept or refuse the notice for voluntary retirement. It is significant to note that while sub-rule (1) of the Rules of 1996 gives the minimum period from three months providing that such notice shall not be of less than three months but no outer limit of the notice period has been given therein. In the circumstances therefore when the petitioner in his notice for voluntary retirement dated 16th July, 2001 fixed 01st January, 2002 as the date on which he was seeking retirement, the period from 15th July, 2001 to 31st December, 2001 was the notice period within which either the petitioner himself could withdraw the notice or the respondents could convey their refusal to him to accept such notice. Neither of them however exercised that right. Although it is true that the pendency of disciplinary proceedings against the petitioner could afford a valid ground to the respondents to refuse to grant him permission for voluntary retirement but when they failed to do so, the proviso to Rule 50 in that event would come into play which categorically provides that where the appointing authority does not refuse to grant permission for retirement

before the expiry of the period specified in the said notice, the retirement shall automatically become effective from the date of expiry of the said period.

The Lordship of Hon'ble Supreme Court in B.J. Shelat Vs. State of Gujarat & Ors., reported in 1978 (2) SCC 202 had occasion to consider an identical provision in Rule 161 of the Bombay Civil Service Rules, 1959 where the rule provided that it shall be open to the appointing authority to withhold permission to retire a Government servant who is under suspension, or against whom departmental proceedings are pending or contemplated. Having received the notice for voluntary retirement, nothing was communicated to the Government servant and yet an argument was sought to be raised before the Hon'ble Supreme Court that non-communication by itself would amount to withholding the permission to retire. Their Lordships while rejecting this argument observed as under:-

> "The words "it shall be open to the appointing authority to withhold permission" would indicate that the appointing authority has got

> an option to withhold permission and that could be exercised by communicating its intention to withhold permission to the Government servant."
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> "For the proviso to become operative it is necessary that the government should not only take a decision but communicate it to the Government servant. It is not necessary that the communication should reach the Government servant."
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> "On a consideration of Rule 161 (2) (ii) and the proviso, we are satisfied that it is incumbent on the Government to communicate to the Government servant its decision to withhold permission to retire on one of the grounds specified in the proviso."

This very question cropped up before the Hon'ble Supreme Court in Union of India & Ors. Vs. Sayed Mazaffar Mir, reported in 1995 Supp. (1) SCC 76 in which case the employer namely the Railways had the power to withhold the permission to grant premature retirement where the employee was under suspension, but they did not do so by a positive order. In the circumstances, their Lordships observed as under:-

> "There are two answers to this submission. The first is that both the provisions relied upon by the learned counsel could require, according to us, passing of appropriate order, when the government servant is under

> suspension (as was the respondent), either of withholding permission to retire or retaining of the incumbent in service. It is an admitted fact that no such order had been passed in the present case. So, despite the right given to the appropriate/competent authority in this regard, the same is of no avail in the present case as the right had not come to be exercised. We do not know the reason(s) thereof. May be, for some reason the authority concerned thought that it would be better for some reason the respondent by allowing him to retire.
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> The second aspect of the matter is that it has been held by a three-Judge Bench of this Court in Dinesh Chandra Sangma vs. State of Assam [(1977) 4 SCC 441], which has dealt with a pari material provision finding place in Rule 56 © of the fundamental Rules, that where the government servant seeks premature retirement the same does not require any acceptance and comes into effect on the completion of the notice period. This decision was followed by another three Judge Bench in B.J. Shelat Vs. State of Gujarat (1978) 2 SCC 202."

This very issue cropped up before the Hon'ble Supreme court in State of Haryana & Ors. vs. S.K. Singhal reported in 1999 (4) SCC 293, their Lordships while considering B.J. Shelat and Sayed Muzaffar Mir held as under:-

> "If, however, as in B.J. Shelat case and as in Sayed Muzaffar Mir case the authority concerned in empowered to withhold

> permission to retire if certain departmental enquiry is pending or is contemplated, the mere pendency of the suspension or departmental enquiry or its contemplation does not result in the notice for voluntary retirement not coming into effect on the expiry of the period specified. What is further needed is that the authority concerned must pass a positive order withholding permission to retire and must also communicate the same to the employee as stated in B.J. Shelat case and in Sayed Muzaffar Mir case before the expiry of the notice period. Consequently, there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that non communication of acceptance should be treated as amounting to withholding of permission."

The Hon'ble Supreme Court again had the occasion to consider this issue in Tek Chand Vs. Dile Ram reported in 2001 (3) SCC 290 while following the decisions referred to above, the Hon'ble Supreme Court categorized cases for voluntary retirement based on the language of the Rule in three categories read as follows:-

> "There are three categories of rules relating to seeking of voluntary retirement after notice. In the first category, voluntary retirement automatically comes into force on expiry of notice period. In the second category also, retirement comes into force unless an order is

> passed during notice period withholding permission to retire and in the third category voluntary retirement does not come into force unless permission to this effect is granted by the competent authority. In such a case, refusal of permission can be communicated even after the expiry of the notice period. It all depends upon the relevant rules."

A Division Bench judgment of this Court in State of Rajasthan vs. Shri R.P. Agarwal & Ors., reported in 2006 (3) WLC (Raj.) 620 considered the entire position of law recapitulated above in the context of notice for voluntary retirement submitted by an employee under Rule 244 (1) of Rajasthan Service Rules, 1951 who too was facing departmental proceedings under Rule 16 of the Rajasthan Civil Services (CCA) Rules, 1958 and as many as three separate charge-sheets were served upon him. On analysis of the provisions of Rule 244 (1) in the light of the law laid down by Hon'ble the Supreme Court in the aforesaid cases, it was held as under:-

> "The instant case, it is evident, falls in the second category if not in the first category, and therefore, it was incumbent upon the State Government not only to take a positive decision rejecting the offer of the respondent

> on the ground that a departmental proceeding was contemplated against him but also to communicate such decision to him within the notice period i.e. by 30.09.1994. Indeed, clause (b) of rule 244(1) which provides that the government servant may presume acceptance of the notice of retirement and the retirement becomes effective in terms of the notice automatically "unless an order in writing to the contrary has been issued by the competent authority and served....." leaves no room for doubt that the government was required to communicate its decision, not to accept the offer, within the notice period. Admittedly, there is nothing on record to suggest that any such decision was taken much less communicated to the respondent. It would thus follow that the voluntary retirement took effect on expiry of the notice period i.e. on 30.09.1994."

A comparison of the language Rule 50 of the Rules of 1966 which has since replaced Rule 244 (1) of RSR would make it clear that the rule making authority has substantially retained the almost same provision although has worded the rule somewhat differently but with almost the same spirit. In the present Rule also, the proviso requires that where the appointing authority does not refuse to grant permission for retiring before the expiry of specific period in the notice, the retirement shall automatically become effective from the date of expiry of the

said period. In proviso to Clause (b) of Rule 244 (1) also it was provided that the government servant who has given notice for seeking retirement may presume acceptance of the notice of retirement and the retirement shall be effective in terms of the notice automatically unless an order in writing to the contrary has been issued by the competent authority and served upon the government servant before the expiry of the period of the notice. What has however been dispensed with in the new rule is the requirement the service of the communication upon the government servant before the expiry of the period of notice. All that is required to be done by the appointing authority now under proviso to Rule 50 is that the appointing authority should by a specific order/communication refuse to grant permission for voluntary retirement. Its service upon the employee now no more a requisite condition for a valid order of refusal.

In the present case, this having not been done, the petitioner shall be deemed to have retired automatically by virtue of proviso to Rule 50 w.e.f. 01st January, 2002.

In the result, the writ petition is allowed with the directions that the petitioner shall be deemed to have retired voluntarily by virtue of proviso to Rule 50 w.e.f. 01st January, 2002 and consequences thereof should therefore follow. There shall be no order as to costs.

[MOHAMMAD RAFIQ],J.

A.K. Chouhan/-